

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ASHA DANIELS,

Plaintiff,

v.

BIG GRRRL BIG TOURING,
INC., et al.,

Defendants.

Case No. CV 24-3571 FLA (PVCx)

**REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Fernando L. Aenlle-Rocha, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

**I.
INTRODUCTION**

Defendant Big Grrrl Big Touring, Inc. seeks discovery sanctions against Plaintiff Asha Daniels on two grounds. (“Motion,” Dkt. No. 68). First, Defendant claims that Plaintiff failed to timely supplement her response to a request for production of documents concerning her mental health treatment. Second, Defendant claims that

Plaintiff failed to disclose data underlying an expert report, also related to Plaintiff's mental health. Plaintiff filed her opposition on August 20, 2025. ("Opp.," Dkt. No. 74) Defendant filed its reply on August 22, 2025. (Dkt. No. 78). For the reasons explained below, it is recommended that Defendant's Motion be GRANTED.

II. STATEMENT OF THE CASE

Plaintiff initiated this case against Defendant and several other codefendants on September 21, 2023. (Dkt. No. 1 at 4).¹ Defendants removed the case to federal court on April 30, 2024. (Dkt. No. 1). The case raises several claims stemming from alleged abuse Plaintiff endured while working for Defendant. (*See* Dkt. No. 32-1).

A. Plaintiff's Mental Health Records

Plaintiff seeks emotional damages in this suit. (*Id.* at 42). Accordingly, Defendant served Request for Production No. 25 on June 6, 2024:

All DOCUMENTS that SUPPORT YOUR claim for emotional distress damages, including, without limitation, DOCUMENTS that evidence, refer to or reflect YOUR treatment by any PERSON (including, without limitation, therapists, psychiatrists, psychologists and/or other providers) and medications prescribed to YOU.

(Dkt. No. 68-2 at 3; "Lerner Decl.," Dkt. No. 68-1 at 2).

¹ For ease of reference, the Court uses page numbers generated by CM/ECF printed in the blue ribbon at the top of each page.

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2
3 Plaintiff responded on July 5, 2024:
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5 Plaintiff incorporates all General Objections. Plaintiff further objects to this
6 request on the basis that it: (1) is vague, ambiguous, and overbroad; (2)
7 seeks documents and information that are protected by the attorney-client
8 privilege and attorney work product doctrine; (3) seeks documents
9 containing protected health information subject to patient-provider privilege
10 and confidentiality; (4) requires Plaintiff, a lay person, to form an expert
11 legal opinion; and (5) calls for a legal conclusion. Subject to and without
12 waiving these objections, Plaintiff responds as follows:
13

14 After reasonable search and diligent inquiry, Plaintiff will produce
15 responsive documents within her possession, custody, and control. Plaintiff
16 is fully complying with this request, and no documents are being withheld
17 for any reason.
18

19 (Opp. at 41)
20

21 In January of 2025, Plaintiff began mental health treatment with therapist Mary
22 Marks and psychiatrist Dr. Lisa Morse. (Opp. at 19). In the subsequent five months,
23 Plaintiff did not provide Defendant with any documentation pertaining to this treatment.
24 (See Mot. at 7; Lerner Decl. at 3). Defendants took Plaintiff's deposition on June 2, 2025.
25 (Opp. at 6). Plaintiff did not discuss her mental health treatment on that date.
26

27 Defendants took Plaintiff's continued deposition on June 17, 2025. (Opp. at 93).
28 During that deposition, Plaintiff disclosed for the first time that she had seen a therapist

1 and a psychiatrist (Ms. Marks and Dr. Morse). (*Id.* at 94). This disclosure came just three
2 days before the June 20 fact discovery cutoff. (Motion at 10; Opp. at 7).²

3
4 On June 30, 2025, Defendant requested Plaintiff’s records related to her treatment
5 with Ms. Marks and Dr. Morse. (Dkt. No. 68-2 at 84–85). Receiving no substantive
6 response, Defendant sent follow-up inquiries on July 14, 18, 21, 22, and 23, 2025.
7 (Lerner Decl. at 3). In emails exchanged prior to an informal discovery conference,
8 Plaintiff indicated that that there was “no actual dispute” because she had agreed to
9 “produce the records.” (Dkt. No. 68-2 at 104).

10
11 The Court held an informal discovery conference to address ongoing issues in the
12 case on August 6, 2025. (Dkt. No. 61). During the conference, Plaintiff’s counsel shared
13 for the first time that he learned of his client’s treatment with Ms. Marks and Dr. Morse
14 contemporaneously with Defendant during the June 17, 2025, deposition. (Opp. at 104).
15 Mr. Zambrano also said that he had “made efforts” to obtain the records, but that they
16 were generated by out of state contractors. (*Id.*).

17
18 **B. Plaintiff’s Expert Report and Its Underlying Data**

19
20 In preparation for trial, Dr. Judy Ho—a clinical and forensic neuropsychologist—
21 prepared an expert psychological evaluation of Plaintiff. (*See* Opp. at 63–91). In so
22 doing, Dr. Ho assessed Plaintiff for more than six hours, using ten specific psychological
23 test and interviews to draw her conclusions. (*Id.* at 19). Those tests were:

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25
26 ² Both parties erroneously report the fact discovery cutoff date a June 22, 2025. (*See*,
27 e.g., Motion at 10; Opp. at 7). The Court set a June 20, 2025, fact discovery cutoff in its
28 April 16, 2026, Order Denying Amended Schedule of Pretrial and Trial Dates Worksheet
(Dkt. No 42) and Continuing Pretrial and Trial Dates on the Court’s Own Motion. (Dkt.
No. 43 at 3).

- 1 1. Beck Anxiety Inventory (BAI)
- 2 2. Beck Depression Inventory–II (BDI-II)
- 3 3. Beck Hopelessness Scale (BHS)
- 4 4. Clinical Interview 5.
- 5 5. Millon Clinical Multiaxial Inventory–IV (MCMI-IV)
- 6 6. Minnesota Multiphasic Personality Inventory-3 (MMPI-3)
- 7 7. Structured Clinical Interview for DSM-5 (SCID-5)
- 8 8. Structured Inventory of Malingered Symptomatology (SIMS)
- 9 9. Structured Interview of Reported Symptoms, 2nd Edition (SIR-2)
- 10 10. Substance Abuse Subtle Screening Inventory-4 (SASSI-4)

11
12 (*Id.* at 64). Plaintiff served the report on June 27, 2025. (*Id.* at 19).

13
14 After reviewing Dr. Ho’s report, Defendant’s counsel emailed Plaintiff’s counsel
15 on June 30, 2025, seeking data underlying the report. (Lerner Decl. at 3). Citing Federal
16 Rule of Civil Procedure 26(a)(2)(B), Defendant’s counsel specifically observed that “Dr.
17 Ho did not produce any of the test results or clinical notes used in preparing her report.”
18 (Dkt. No. 68-2 at 86). Defendant’s counsel requested release of that information. (*Id.*).

19
20 In the following weeks, Plaintiff supplemented her expert report with other
21 information Defendant had requested, but not the underlying data used in the expert’s
22 testing. (Lerner Decl. at 3–5; *see also* 68-2 at 83–96). On July 25, 2025, Defendant’s
23 medical expert, Dr. James Rosenberg, conducted his medical examination of Plaintiff.
24 (Lerner Decl. at 5). At the time, Dr. Rosenberg had not been able to review the
25 underlying data Dr. Ho had collected during her evaluation of Plaintiff.

26
27 On July 29, 2025, Defendant’s counsel again asked Plaintiff for the full set of test
28 results gathered during Dr. Ho’s evaluation. (*Id.* at 5). Defendant’s counsel emphasized

1 that the expert rebuttal disclosure deadline was days away. (*Id.*). Again, Plaintiff
2 declined to provide the underlying data. Plaintiff instead asked Defendant whether it had
3 propounded a discovery request for production seeking the data in question. (*Id.* 5–6).
4 Defendant responded by taking the position that no request for production was necessary,
5 as the language of Rule 26 required automatic disclosure. (*Id.*). As of oral argument on
6 the motion, Plaintiff had not produced the underlying data.

7
8 **C. Defendant’s Sanctions Motion**

9
10 Defendant filed its motion for sanctions on August 13, 2025. (“Motion,” Dkt. No.
11 68). At that time, Plaintiff had not produced records related to her treatment with Ms.
12 Marks or Dr. Morse. (*Id.* at 7).

13
14 The Court heard oral arguments on the motion on September 9, 2025. (Dkt. No.
15 79). During the argument, Plaintiff’s counsel provided the following information about
16 his effort to produce records responsive to Request for Production No. 25.

17
18 Plaintiff received treatment from Ms. Marks and Dr. Morse online through Zoom.
19 While the two are based in Florida, the online service provider that connected Plaintiff
20 with Ms. Marks and Dr. Morse is based in Texas.

21
22 Plaintiff’s counsel contacted both Ms. Marks and Dr. Morse as well as the Texas-
23 based service provider to retrieve Plaintiff’s records. The service provider directed
24 Plaintiff’s counsel to Ms. Marks and Dr. Morse, telling him that they were the appropriate
25 parties to provide the records. At the time of oral argument, Plaintiff’s counsel had not
26 heard from either Ms. Marks or Dr. Morse

1 Plaintiff sought online treatment through Zoom from a Texas-based service
2 provider. Plaintiff's treatment providers, Ms. Marks and Dr. Morse, are based in Florida.
3 Plaintiff's counsel contacted the service provider seeking Plaintiff's records. The service
4 provider responded indicating that he would need to get records directly from the
5 treatment providers. The treatment providers have not responded to inquiries from
6 Plaintiff directly or her counsel.

7
8 **III.**
9 **APPLICABLE LEGAL PRINCIPLES**

10
11 **A. Scope of Discovery**

12
13 Federal Rule of Civil Procedure 26(b)(1), as amended on December 1, 2015,
14 provides:

15
16 Parties may obtain discovery regarding any nonprivileged matter that is
17 relevant to any party's claim or defense and proportional to the needs of the
18 case, considering the importance of the issues at stake in the action, the
19 amount in controversy, the parties' relative access to relevant information,
20 the parties' resources, the importance of the discovery in resolving the
21 issues, and whether the burden or expense of the proposed discovery
22 outweighs its likely benefit. Information within this scope of discovery
23 need not be admissible in evidence to be discoverable.

24
25 Fed. R. Civ. P. 26(b)(1).
26
27
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1 **B. Requests for Production and the Duty to Supplement**

2
3 Under the Federal Rules of Civil Procedure, one party may request from another
4 production of responsive documents “in the responding party’s possession, custody, or
5 control.” Fed. R. Civ. P. 34(a)(1). A requesting party must describe the items to be
6 produced with “reasonable particularity.” Fed. R. Civ. P. 34(b)(1). Following a
7 reasonable investigation to locate responsive materials, a responding party must serve a
8 written response to each request either stating that it will produce copies of the documents
9 requested or identifying the grounds for any objection. Fed. R. Civ. P. 34(b)(2)(B).
10 “Where a responding party does not object to a request but determines after a reasonable
11 search that it has no responsive documents in its possession, custody or control, the better
12 practice is for the response to affirmatively state that no responsive documents exist.”
13 *Bennett v. 38604 10th St. E., LLC*, No. CV208858, 2021 WL 5038757, at *4 (C.D. Cal.
14 July 30, 2021)

15
16 If a party who has responded to a request for production “learns that in some
17 material respect the disclosure or response is incomplete or incorrect,” that party “must
18 supplement or correct its disclosure or response” “in a timely manner,” unless “the
19 additional or corrective information has . . . otherwise been known to the other parties
20 during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1). “The duty to
21 disclose is triggered when the party learns that in some material respect the information is
22 incomplete or incorrect.” *Kara Tech., Inc v. Stamps.com, Inc.*, No. 05-1890, 2008 WL
23 11338711, at *1 (C.D. Cal. Apr. 3, 2008)

24
25 **C. Expert Disclosures**

26
27 “[A] party must disclose to the other parties the identity of any witness it may use
28 at trial to present” expert testimony. Fed. R. Civ. P. 26(a)(2)(A). “Unless otherwise

1 stipulated or ordered by the court, this disclosure must be accompanied by a written
2 report—prepared and signed by the witness—if the witness is one retained or specially
3 employed to provide expert testimony in the case or one whose duties as the party’s
4 employee regularly involve giving expert testimony.” Fed. R. Civ. P. 26(a)(2)(B).
5 Among the specific required components of the report are “the facts or data considered by
6 the witness in forming” her opinions. Fed. R. Civ. P. 26(a)(2)(B)(ii). “As explained in
7 the Advisory Committee Notes to the 2010 Amendment, ‘facts or data’ as used in Rule
8 26(a)(2)(B)(ii) is to ‘be interpreted broadly to require disclosure of *any material*
9 *considered by the expert, from whatever source, that contains factual ingredients*. The
10 disclosure obligation extends to any facts or data ‘considered’ by the expert in forming the
11 opinions to be expressed, not only those relied upon by the expert.” *Santa Clarita Valley*
12 *Water Agency v. Whittaker Corp.*, No. CV1806825, 2020 WL 6260015, at *1 (C.D. Cal.
13 Sept. 16, 2020) (citing Fed. R. Civ. P. 26 Advisory Committee’s Note to 2010
14 Amendment) (emphasis added).

15
16 **D. Sanctions**

17
18 “If a party fails to provide information or identify a witness as required by Rule
19 26(a) or (e), the party is not allowed to use that information or witness to supply evidence
20 on a motion, at a hearing, or at a trial unless the failure was substantially justified or is
21 harmless.” Fed. R. Civ. P. 37(c)(1). Upon a motion and hearing, a court additionally or
22 alternatively:

- 23
24 (A) may order payment of the reasonable expenses, including attorney’s
25 fees, caused by the failure;
26 (B) may inform the jury of the party’s failure; and
27 (C) may impose other appropriate sanctions, including any of the orders
28 listed in Rule 37(b)(2)(A)(i)–(vi).

1 Fed. R. Civ. P. 37(c)(1).

2
3 This sanction is “self-executing.” Fed R. Civ. P. 37 advisory committee’s note to
4 1993 Amendments. It gives Rule 26 “teeth” “by forbidding the use at trial of any
5 information required to be disclosed by Rule 26(a) that is not properly disclosed.” *Yeti by*
6 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). However,
7 “[t]he automatic nature of the rule’s application does not mean that a district court *must*
8 exclude evidence that runs afoul of Rule 26(a) or (e).” *Merchant v. Corizon Health, Inc.*,
9 993 F.3d 733, 740 (9th Cir. 2021) (emphasis in original). Instead, “the rule is automatic
10 in the sense that a district court *may* properly impose an exclusion sanction where a
11 noncompliant party has failed to show that the discovery violation was either substantially
12 justified or harmless.” *Id.* (emphasis in original). In that sense, Ninth Circuit has given
13 district courts “particularly wide latitude” to issue sanctions under this rule. *Yeti*, 259
14 F.3d at 1106.

15 16 IV.

17 DISCUSSION

18 19 A. **Plaintiff’s Failure to Produce Her Mental Health Records Was Neither** 20 **Justified nor Harmless.**

21
22 Defendant’s Request for Production No. 25 sought documents supporting
23 Plaintiff’s claim “for emotional distress damages.” (Lerner Decl. at 2). This included
24 documentation related to treatment by “therapists, psychiatrists, psychologists and/or
25 other providers.” (*Id.*). Plaintiff agrees that documents related to her treatment with Ms.
26 Marks and Dr. Morse are responsive. (*See* Dkt. No. 68-2 at 104 (explaining that was “no
27
28

1 actual dispute” on this issue because Plaintiff had agreed to “produce the records”)).
2 However, Plaintiff has not yet produced those records.³

3
4 Plaintiff has not justified her failure to produce the documents. In her brief,
5 Plaintiff first tries to excuse her obligation to provide the documents by noting that her
6 “treatment began . . . six to seven months after Plaintiff’s initial discovery responses in
7 July 2024, when no such records existed.” (Opp. at 10). She then claims that she
8 “disclosed the relevant mental health treatment as soon as it reasonably could have been
9 known and documented.” (*Id.* at 12). This is untrue. Plaintiff was obliged to supplement
10 her responses to requests for production in a timely manner upon learning that any
11 production was incomplete. *See* Fed. R. Civ. P. 26(e)(1). That duty triggered sometime
12 shortly after Plaintiff began her mental health treatment in January 2025, not six months
13 later.

14
15 Second, Plaintiff attempts to minimize the failure to produce the records by
16 explaining that her counsel did not learn about Plaintiff’s treatment until she disclosed it at
17 her June 17, 2025, deposition. (Opp. at 104). While the obligation to supplement
18 discovery responses rests with the party, “[c]ounsel in a litigation have legal duties to take
19 proactive steps in supervising and searching for documents in discovery that go far
20 beyond simply acceding to a client who fails . . . to produce or provide documents.” *In re*
21 *Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, No. 22-MD-03047, 2024
22 WL 4125618, at *15 (N.D. Cal. Sept. 6, 2024). “Counsel cannot simply advise clients
23 about document requests and leave it up to the client to decide whether or not to risk
24 sanctions for failure to produce—in appropriate circumstances, counsel may need to
25 personally conduct or directly supervise a client’s collection, review, and production of
26 responsive documents.” *Id.* The fact that Plaintiff’s counsel learned of Plaintiffs

27
28 ³ The Court learned at the September 9, 2025, oral argument that the documents had not
been produced. It has not received any updates on this status since then.

1 treatment and the possibility of related documents late in the game does not excuse their
2 production.

3
4 Finally, and perhaps most importantly, Plaintiff blames Ms. Marks and Dr. Morse
5 for Plaintiff's failure to produce the documents. Apparently, these mental health
6 providers have not responded to her requests for those records. In some sense, this raises
7 the question whether the requested documents are in Plaintiff's control as defined by rule
8 34(a)(1).⁴

9
10 "[A] party need not have actual possession of documents to be deemed in control
11 of them." *Est. of Young Through Young v. Holmes*, 134 F.R.D. 291, 294 (D. Nev. 1991)
12 (citation omitted). Instead, "[c]ontrol is defined as the legal right to obtain documents
13 upon demand." *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999) (citation
14 omitted). Generally, the "party seeking production of the documents . . . bears the burden
15 of proving that the opposing party has such control." *United States v. Int'l Union of*
16 *Petroleum & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989). However,
17 the parties have not briefed this issue, and it is axiomatic that a patient has the right to her
18 own medical and mental health records. *See, e.g.*, 45 C.F.R. § 164.524. Accordingly, for
19 the purposes of this dispute, the Court assumes that Plaintiff had legal control over the
20 records in question.

21
22 Plaintiff has not presented sufficient evidence to show that she sought production
23 of these records in good faith. Below is a summary of Plaintiff's efforts to obtain the
24 records.

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⁴ Plaintiff has not formally objected to production on the ground. Still, the Court
believes some consideration of this issue is appropriate.

1 In a July 23, 2025, email preparing for a requested informal discovery conference,
2 Plaintiff explained that “we’re making efforts to get the records. But we don’t have them
3 yet. When we do have them, we will send them to counsel.” (Opp. at 99).

4
5 During the August 6, 2025, informal discovery conference, Plaintiff’s counsel told
6 the Court:

7
8 We did not learn of the existence of [Ms. Marks and Dr. Morse] until June
9 17th. . . . So we have made efforts. I’m not telling [Defendant’s counsel]
10 or anybody here that they’re not entitled to the records. I’m trying to get the
11 records. These . . . are records generated by people contracted through [the
12 service provider], people that schedule these things. They’re out of state.
13 We are trying to get the records. We have give[n] authorizations.

14
15 (Opp. at 103).

16
17 In the declaration Plaintiff’s counsel filed with Plaintiff’s Opposition, Plaintiff’s
18 attested to the following information.

19
20 14. On June 30, 2025, Defendant’s counsel contacted me requesting
21 production of Plaintiff’s mental health treatment records

22 15. I immediately began efforts to obtain the requested mental health
23 records and confirmed that records would be produced, emphasizing
24 repeatedly that “we have nothing to hide” and attributing the delays to
25 provider unavailability and administrative processing.

26
27 (Opp. at 19–20),
28

1 At the September 9, 2025, oral argument on this Motion, Plaintiff's counsel
2 explained the details of his and Plaintiff's efforts to retrieve the records. Plaintiff's
3 counsel told the Court that he and Plaintiff individually contacted Ms. Marks and Dr.
4 Morse requesting Plaintiff's records. Neither Plaintiff nor Plaintiff's counsel have heard
5 back from them.

6
7 Plaintiff describes these communications as "reflect[ing] a good faith effort to
8 obtain and produce the documents promptly." (Opp. at 12). Unfortunately, the evidence
9 this Court must use to weigh the credibility of that claim does not support that proposition.
10 Plaintiff's descriptions of her efforts are vague. They do little to educate the Court on
11 how Plaintiff and her counsel contacted Ms. Marks or Dr. Morse; they do not clarify
12 whether these requests were made by phone, postal mail, or email. If done in writing,
13 Plaintiff has not produced physical copies of these communications. Nor has Plaintiff
14 explained why—after months of receiving no response—she or her counsel have not made
15 follow-up inquiries. The Court finds it hard to believe that mental health providers, one of
16 whom being a registered physician, would cavalierly ignore a patient's request for her
17 records. Plaintiff has not justified her failure to produce the responsive documents.

18
19 Nor has Plaintiff shown that her failure to produce the documents is harmless. She
20 argues that these records can only help her; they speak to the severity of the harm she
21 suffered. (Dkt. No. 79). This position fails to consider the fact that, upon review,
22 Defendant may discover that the records provide information showing that Plaintiff's
23 emotional harm was less severe than she claims. Plaintiff also claims no error because
24 Defendant's psychological expert was able to complete his report even without the
25 records. Lacking these records, Defendant's report is incomplete, at best. He was not
26 able to review and consider materials related to Plaintiff's actual psychological treatment.
27 Ultimately, these documents go right to the heart of Plaintiff's claim for emotional
28

1 damages. These documents are relevant. Defendant was entitled to view them to prepare
2 its defense.⁵

3
4 In sum, sanctions under Rule 37 are appropriate considering Plaintiff's failure to
5 produce her mental health treatment records. She should be barred from presenting at trial
6 evidence of her treatment by mental health professionals.

7
8 **B. Plaintiff's Failure to Produce the Underlying Data Supporting Dr.**
9 **Ho's Report Was Neither Justified nor Harmless.**
10

11 Plaintiff argues that her expert's report complied with Rule 26 because it disclosed
12 the ten specific tests she used and "the clinical interview and background records she
13 reviewed." (Opp. at 14). She also claims that the report was sufficient because it "offers
14 a thorough analysis of the test results." (*Id.*). While these positions may be true, they do
15 little to establish that Dr. Ho's report measured up to Rule 26's bar.

16
17 Rule 26 requires an expert witness to disclose "the facts or data" she
18 "considered . . . in forming" her opinions. Fed. R. Civ. P. 26(a)(2)(B)(ii). That
19 information includes "any material considered by the expert, from whatever source, that
20 contains factual ingredients." *Santa Clarita Valley*, 2020 WL 6260015, at *1 (citation
21 omitted). These obligations exist whether or not an opposing party has requested
22 production of this information. Plaintiff has failed to show otherwise.

23
24
25
26 ⁵ Plaintiff additionally asks this Court to consider the five factors citing *Wanderer v.*
27 *Johnson*, 910 F.2d 652 (9th Cir. 1990) used for weighing discovery sanctions. (See Opp.
28 at 11–12). These factors apply only when one party seeks terminating sanctions against
another. Defendant does not seek terminating sanctions. The Court, accordingly, finds no
reason to weigh these factors.

1 Both parties argue that *Percelle v. Pearson* supports their interpretations of Rule
2 26. No. 12-CV-05343, 2016 WL 6427883, at *2 (N.D. Cal. Oct. 31, 2016). In that case,
3 defendants sought to exclude the testimony of plaintiff's expert because, as claimed here,
4 the expert failed to properly disclose test results. *Id.* Specifically, defendants cited test
5 results for the MMPI-2RF, a psychological test the expert had used to diagnose the
6 plaintiff. *Id.* Plaintiff had not disclosed the results of those tests, but justified that
7 position by, like here, noting that defendants had not requested production of the results.
8 The *Percelle* court rejected that position. "Federal Rule of Civil Procedure 26(a)(2)(B)(ii)
9 imposes a duty on the proponent of the expert evidence to provide 'the facts or data
10 considered by the witness' in forming their opinion. The test results here are data that
11 Plaintiff should have disclosed." *Id.* Because of this failure, the court prohibited
12 Plaintiff's expert from testifying at trial about the MMPI-2RF test. *Id.*

13
14 Plaintiff reads *Percelle* as "involv[ing] a complete failure to disclose test results."
15 (Opp. 14). She distinguishes the facts here by noting that "Dr. Ho's report specifically
16 identifies all tests administered and provides analysis of the results." (*Id.*). However,
17 identification of the tests and an analysis of their results is *not* the same as producing the
18 results themselves. Dr. Ho's report does include *some* testing data. (*See id.* at 62–91). It
19 does not, however, contain the underlying data Rule 26 contemplates. *Percelle* is directly
20 on point, and it supports Defendant's interpretation of Rule 26. "The test results here are
21 data that Plaintiff should have disclosed." *Percelle*, 2016 WL 6427883, at *2.

22
23 Plaintiff has not shown that her failure to produce the underlying data was justified.
24 Rule 26's text obligated the data's disclosure. And Defendant had no obligation to serve a
25 request for production to obtain it. Plaintiff argues that copyright and confidentiality
26 concerns bar the data's disclosure, but Plaintiff provides no authority for this position, nor
27 does she present any evidence to support this claim. The Court is unpersuaded.
28

1 Plaintiff's failure to produce the underlying data was not harmless. Though
2 Plaintiff's expert never sat for a deposition, Defendant's expert has been and will be
3 deprived of viewing the underlying data and will not be able to sufficiently rebut Dr. Ho's
4 testimony. Without this opportunity, Dr. Rosenberg will not be able to meaningfully
5 engage with Dr. Ho's testimony.

6
7 In sum, sanctions under Rule 37 are appropriate considering Plaintiff's failure to
8 produce the data supporting Dr. Ho's report. Plaintiff should be barred from presenting at
9 trial Dr. Ho's report and testimony from Dr. Ho regarding her opinions pertaining to
10 Plaintiff's emotional distress damages.

11
12 V.

13 **RECOMMENDATION**

14
15 For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an
16 Order: (1) accepting this Report and Recommendation, (2) granting Defendant's Motion
17 for Sanctions (Dkt. No. 68), and (3) sanctioning Plaintiff with the evidentiary limitations
18 described herein.

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20
21 DATED: September 30, 2025



22
23
24 PEDRO V. CASTILLO
UNITED STATES MAGISTRATE JUDGE